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THE COMMERCE CLAUSE, AND TAXATION OF GROSS RECEIPTS AND OF "INTANGIBLE PROPERTY."

THE decision in *Galveston, Harrisburg &c. Ry. Co. v. Texas*¹ curiously, perhaps even painfully, illustrates the confusion that has resulted from the establishment by the Supreme Court of what seem to me to be incompatible rules of taxation.

As is well understood, the commerce clause of the Federal Constitution imposes certain restrictions upon action under the authority of a State. That is to say, it is a general rule that has been frequently applied, that no restriction by way of prohibition or otherwise may be validly imposed under the authority of a State upon transportation within the scope of the commerce clause.² Now such restrictions invalidly imposed under the authority of a State have commonly been in the form of a *condition*, rather than of absolute prohibition, thus, though by no means necessarily, by way of requirement of payment of a "tax," commonly termed a "license" or "privilege" tax. But such a "tax" is to be carefully distinguished from a mere ordinary tax on property, not imposed by way of condition. Yet the distinction has not infrequently been overlooked, with resultant confusion.

Thus it is beyond the power of a State to impose a "license tax" as a *condition* of transacting the business (that is, in so far as within the scope of the commerce clause) of soliciting passengers for travel by railroad³; so as to the business of transmission of telegraph messages⁴; or that of transportation by express⁵. On the other hand, it is equally well settled that if otherwise property is subject to taxation under the authority of a State, it is no objection to taxation thereof that it is employed in transportation within the scope of the commerce clause.⁶

Now it may well be that the particular property employed in such transportation has all been acquired in the course of such transportation. Thus the rolling stock or the road bed of a railroad may well have been, indeed frequently has been, paid for out of the profits derived in large part from such transportation. But cer-

¹ 210 U. S. 217 (1909).

² Cooke, Commerce Clause, § 69.

³ *McCall v. California* (1890), 136 U. S. 104.

⁴ *Leloup v. Port of Mobile* (1888), 127 U. S. 640.

⁵ *Crutcher v. Kentucky* (1891), 141 U. S. 47.

⁶ Cooke, Commerce Clause, § 112.

tainly that is no objection to taxation thereof under the authority of a State.

Nevertheless the Supreme Court has established the doctrine that under certain conditions it is a valid objection to taxation under the authority of a State, that the property taxed was derived from transportation within the scope of the commerce clause. A railroad corporation may have at a given time cash in bank constituting a part of profits derived from such transportation, and rolling stock paid for out of the same profits. The rolling stock is taxable; the cash is not.

That is to say, there here applies the rule applied in *Galveston, Harrisburg &c. Ry Co. v. Texas*, and there thus stated; "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*⁷ it was decided that a tax upon the gross receipts of a steamship corporation of the State, *when such receipts were derived from commerce between the States and with foreign countries*, was unconstitutional. We regard this distinction as unshaken and as stating established law."

This rule seems to me to be entirely unsound, at any rate inconsistent with the rule allowing the taxation of property employed in transportation within the scope of the commerce clause. In neither case is the tax imposed as a condition of engaging in such transportation. Of course, from a practical standpoint, the prospect of the imposition of a tax on receipts, may, like the prospect of the imposition of an ordinary property tax, operate to deter from engaging in such transportation, but this seems clearly distinguishable from the imposition of a *condition*.

On this point the following reasoning of counsel in *State Freight Tax Case*⁸ seems to me to be unanswerable: "Does it (the tax) make a rule to govern the shipment of a ton of coal passing out of the State? It clearly does not, for a ton of coal is shipped just as freely, without either the knowledge or interference of the State, as though there was no such law in force. It is not until months after the ton has been shipped that the State knows the fact: it is not until months later that the tax is payable by the company. How then can this be a rule to govern the intercourse?"

But I am not here specially concerned to engage in what seems to be a merely academic discussion of the soundness of the rule denying the validity of the imposition of a tax under the authority of a State upon gross receipts "derived from commerce between the States and with foreign countries." What I desire to make plain

⁷ 122 U. S. 326 (1887).

⁸ 15 Wall, 232, 251 (Dec. 1872).

is that the rule allowing such a tax, having been solemnly ejected by the Supreme Court through the front door, has been allowed to sneak in through the back door, though under a different name, so that it continues triumphantly in possession. This result has been reached by the establishment of the rule allowing taxation of "*intangible property*."

Now the idea of *property* is without substantial significance, apart from some use to which the property is—or may be—put. I might conceivably own real estate in the moon, or in the immediate vicinity of the North Pole, but the idea of any *property* therein would be a barren abstraction, there being no *use* or prospect of any use to which such property can be put. Of course the idea of property does not necessarily involve the idea of deriving therefrom *profits* in the ordinary sense, thus, in the case of clothes that we wear, or the food that we eat. But in case of property employed in trade or business, thus for transportation by railroad or express, or for transmission of telegraphic messages, the idea of *property* almost necessarily involves the idea of *profits* derived by the owners, in the form of "receipts." Consider the distinction between the ownership of the roadbed, rolling stock, &c. of the Pennsylvania railroad, as they are now located, and the ownership of an identically similar roadbed, rolling stock, &c. in the moon, or in the immediate vicinity of the North Pole.

Suppose the existence of certain vehicles and other personal property that have little or no value apart from their capability of use for transportation by express, which, for the sake of clearness, let us assume to be wholly transportation within the scope of the commerce clause. This previously valueless or nearly valueless property now yields "gross receipts" of \$500,000 a year, and the value of the property, as indicated by sales of the securities of the corporation owner, becomes \$10,000,000. Here, as a result of use in transportation within the scope of the commerce clause, has come into existence a value available for the purpose of taxation, and the State imposes a tax amounting to \$50,000 a year. Obviously the practical effect is the same, whether such sum be regarded as ten per cent of the gross receipts, or as one half of one per cent of the "intangible property." The essential point is that in either view the tax is imposed on account of what (no matter by what name called, whether "property" or "intangible property" or "value" or "receipts") has come into existence as a result of the use of certain property in transportation within the scope of the commerce clause. Yet, according to the Supreme Court, the tax of \$50,000 is invalidly imposed, if regarded as a percentage of \$500,000, the amount of the gross re-

ceipts; it is validly imposed, if regarded as a percentage of \$10,000,000, the value of the "intangible property." Is not this a case of tweedle-dum and tweedle-dee?

That it is validly imposed in the latter view appears from *Adams Express Co. v. Ohio State Auditor*,⁹ where was sustained the imposition of a tax upon an express company largely engaged in transportation within the scope of the commerce clause, under a statute providing that, in determining the value of its property, the assessing body should "be guided by the value of said property as determined by the value of *the entire capital stock*." The decision seems to rest on what is, I submit, the erroneous and gratuitous assumption that there was no alternative between taxing the property irrespective of the particular use to which it was put, and taxing it with reference to its use for transportation within the scope of the commerce clause. But was there not a third alternative, entirely overlooked or ignored by the court, that of taxing it with reference to its use for *transportation wholly within the State*?

Objectionable on the same ground seems *Henderson Bridge Co. v. Kentucky*,¹⁰ where was sustained a tax as on the "intangible property" of a corporation that, though not itself directly engaged in transportation within the scope of the commerce clause, received tolls for the privilege of using a bridge for the purpose of such transportation.

Now the decision in *Galveston, Harrisburg &c. Ry. Co. v. Texas* seems to me to indicate that at last the Supreme Court has come, or is coming to, a realization of the inconsistency that I have discussed. After referring to *Adams Express Co. v. Ohio State Auditor* and like decisions, it was said: "*Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers properly might be taxed as a going concern.*" Without comment, I content myself with saying that here seems to me to be substantially an admission of the incompatibility of the rules in question. Continuing, it was said: "We are to look for a practical rather than a logical or philosophical distinction. The

⁹ 165 U. S. 194 (1897).

¹⁰ 166 U. S. 150 (1897).

State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. *The two necessities hardly admit of an absolute logical reconciliation.*"

Nevertheless the opinion contains the following attempt at reconciliation: "Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can." I am not sure that I fully understand what is meant here, but there seems involved the idea that, as to the action of State legislatures, it is likely to make a good deal of difference by what name a given scheme of taxation is called. I confess to failure to be entirely satisfied with a distinction based on such a supposition.

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